STATE OF NEW YORK PUBLIC SERVICE COMMISSION

Petition of New York Telephone
Company for Approval of its Statement
of Generally Available Terms and
Conditions Pursuant to Section 252 of
the Telecommunications Act of 1996
and Draft Filing of Petition for
InterLATA Entry Pursuant to Section
271 of the Telecommunications
Act of 1996

Case No. 97-C-0271

INITIAL BRIEF OF AT&T COMMUNICATIONS OF NEW YORK, INC.

AT&T COMMUNICATIONS OF NEW YORK, INC.

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INITIAL BRIEF OF AT&T COMMUNICATIONS OF NEW YORK, INC.

I. INTRODUCTION AND SUMMARY OF ARGUMENT

AT&T Communications of New York, Inc. ("AT&T") submits this Initial Brief with respect to the draft application of New York Telephone Co. ("NYT") for authority pursuant to Section 271 of the Telecommunications Act of 1996 ("Act") to provide inregion interLATA services, and for approval of its Statement of Generally Available Terms and Conditions ("SGAT"). In the sections below, AT&T will fully review NYT's application, SGAT, and testimony, and the responsive testimony of actual and potential competitive local exchange carriers ("CLECs"). Before turning to these issues, however, AT&T would like to provide an overview of the record, highlighting what it sees as some of the major recurring themes.

First, we should not be here. NYT's filing was intended to give the New York Public Service Commission (the "Commission") and interested parties an opportunity to preview

NYT's proposed application to the Federal Communications

Commission ("FCC") for authority pursuant to Section 271 to offer
in-region interLATA services. The FCC has specifically ruled
that such an application must "include all of the factual
evidence on which the applicant would have the [FCC] rely in
making its findings thereon." NYT's filing does not remotely
satisfy this standard, or the provisions of Section 271 of the
Act. Its Statement of Generally Available Terms ("SGAT") is
patently inadequate, and its request for approval by this
Commission of its Section 271 application profoundly premature.

Most fundamentally, NYT's filing and its supporting testimony are too often, in words and in fact, in the wrong tense. The requirements of Section 271 are written in the past tense. A Bell Operating Company must show that it "has met the requirements of subsection (c) (1)" and "has fully implemented the competitive checklist in subsection (c) (2) (B)." 47 U.S.C. § 271(d) (3) (A) (i) (emphasis added). NYT's application is too

¹Procedures for Bell Operating Company Applications under New Section 271 of the Communications Act, FCC 96-469, at 2 (Dec. 6, 1996). See also Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as amended, to Provide In-Region InterLATA Services in Michigan, CC Docket No. 97-1, at 12 (Feb. 7, 1997) (FCC requires "submission of a complete application at the commencement of a section 271 proceeding").

²The recent Procedural Ruling issued in this proceeding sets the questions in the present tense: (1) "Is the item commercially available?"; (2) "Is it available at any technically feasible point?"; and (3) Is it available at rates, terms and conditions that are just, reasonable, and nondiscriminatory?". See Procedural Ruling issued April 8, 1997, Appendix A.

often written in the future tense, based upon promises of what it will do tomorrow but has not done yesterday and cannot do today.

Among the various checklist requirements that NYT concedes it cannot currently satisfy are at least the following:

- o NYT cannot provide line side interconnection. Tr. 43-44 (Garzillo); Tr. 199-200 (Gansert).
- o NYT cannot provide two-way trunking. Tr. 215-16, 697-98 (Garzillo).
- o NYT cannot provide direct (switch to switch) trunking. Tr. 45-46 (Garzillo).
- o NYT cannot provide the unbundled switching element. Tr. 230-31, 331-32 (Garzillo).
- o NYT cannot provide virtual collocation. Tr. 29-30, 34-35 (Garzillo).
- o NYT cannot provide nondiscriminatory and commercially available access to its Operations Support Systems ("OSS"). Tr. 260 (Coffey); Tr. 442-43, 447-48, 452-463 (Miller).
- o NYT cannot provide access to AIN data bases. Tr. 546 (Garzillo).

This list is not all inclusive; other problems are described below. It is, however, more than sufficient to demonstrate that NYT was not and is not close to being ready to go to the FCC and satisfy its statutory burdens there. Moreover, virtually all of the checklist items that NYT has provided are not provided on the basis of demonstrated parity or on a commercially reasonable basis.

NYT's SGAT suffers from similar defects. Aside from its other defects, discussed below, it is apparently based on an intriguing, but rather silly, attempt to differentiate between

what NYT "offers" and what it "provides." Tr. 228-31 (Garzillo). NYT, however, is not "generally offering" an unbundled network element ("UNE") merely because NYT has written on a piece of paper that it is "willing to offer" it. Tr. 230 (Garzillo). Both the Act and traditional tariff law require that a carrier be able to provide the actual service promised in the SGAT or the tariff, i.e., that the item be actually available. Indeed, for access or an element to be "commercially available" within the meaning of the Procedural Ruling, NYT must be actually furnishing the item to CLECs in competitively significant volumes on the basis of rates, terms, and conditions that are just, reasonable, and nondiscriminatory.

The SGAT, therefore, can be approved only if NYT is actually furnishing the items promised in the SGAT in a commercially reasonable manner or if NYT can demonstrate -- via testing or other comparable means -- that it could actually and timely furnish the items in competitively significant volumes in a nondiscriminatory manner if requested to do so. The record,

³As part of the Section 271 process, NYT must demonstrate that the rates for unbundled network elements are just, reasonable, and nondiscriminatory. The rate issues have generally been considered in other Commission proceedings, and for that reason, they were not the focus of written or oral testimony submitted by CLECs in this proceeding. Nonetheless, AT&T intervals to argue that the unbundled element rates approved by the Commission are not cost-based and do not comply with the Act.

⁴See In re BellSouth Telecommunications Inc. Statement of Generally Available Terms and Conditions Under Section 252(f) of the Telecommunications Act of 1996, Docket No. 7253-U (Ga. PSC March 20, 1997) ("Ga. SGAT Decision").

however, shows conclusively that NYT cannot meet many of its promises in the SGAT today, and will be unable to do so for some time to come. Accordingly, the SGAT must be rejected.

NYT's admission that it cannot currently satisfy numerous checklist obligations is sufficient as a matter of law to doom both its Section 271 application and its SGAT. NYT's approach, however, and the evidence of every carrier that has attempted to do business with NYT in recent years, demonstrate why it is so critically important to demand of NYT evidence of actual, successful, "full implement[ation]" of each checklist item before NYT found to satisfy that checklist requirement.

As this Commission is well aware from past experience, NYT's written promises to perform are not guarantees of either the ability or the willingness to perform. It took more than a year after NYT signed the Performance Regulation Plan ("PRP") before NYT began to show any signs of actually being able to meet its service quality commitments to end users. NYT's performance in serving its competitors is, if anything, worse. The experience of several competitors in seeking commercially reasonable provisioning of collocated cages is well known to the Commission and is contained in this record. NYT itself repeatedly admitted at the technical conference that it has not satisfied even its own provisioning and service quality standards with respect to such critical aspects of the checklist as loop provisioning. E.G., Tr. 255 (Garzillo). That is why both the statute and the record require that NYT produce, for each

checklist item, evidence in the past tense: evidence that it has delivered the checklist item, reliably, over a reasonable period of time, on a commercially reasonable basis, at any technically feasible point, and at rates, terms, and conditions that are just, reasonable, and nondiscriminatory.

A second, closely related theme running throughout the discussion of the individual checklist items is the theme of competitive parity and the presence -- or more accurately, absence -- of metrics. It is undisputed that NYT must provide "nondiscriminatory access to network elements." 47 U.S.C. § 251(c)(3). NYT clearly bears the burden of proving that it offers unbundled network elements, interconnection, and operations support systems on the basis of "parity." NYT cannot meet this burden until clear metrics are defined that measure both NYT's performance to its competitors and NYT's performance to itself.

NYT treats serious metrics the way a vampire is reputed to treat the cross. It shies away. In case after case, with respect to checklist item after checklist item. NYT states that it has no data on, and has developed no metrics to measure, either its own performance in serving itself or its own performance in serving its competitors. E.G., Tr. 260 (Coffey); Tr. 442-43 (Miller); NYT Response to Staff-NYT-3.1. The reason for this is, again, well known to this Commission, which has dealt with NYT's repeated petitions for waiver of the performance standards imposed by the Commission on NYT in the PRP.

Good metrics are critical both as a matter of law and as a matter of policy. As a matter of law, NYT will not satisfy its burden of showing parity without them. As a matter of policy, neither this Commission nor the FCC will be in any position to conclude that NYT is providing commercially reasonable services merely because NYT has promised to do so.

The one unambiguous piece of evidence that <u>did</u> come from the record of this proceeding relating to parity over-whelmingly refutes NYT's claim of parity. Notwithstanding NYT's claims that its EIF and Web/GUI interfaces satisfy its obligations to provide comparable ordering and provision services to competitors, the record shows that actual time for CLECs to obtain access to a customer service record is at least <u>ten times</u> the rate that an NYT service representative experiences. This data (which came from CLECs and from cross-examination of NYT's witnesses, not from NYT's application) shows clearly why assertions of nondiscrimination without evidence cannot satisfy the checklist requirements.

Two additional points about metrics warrant discussion. First, to be valid, the metrics must be agreed upon by both NYT and its CLEC customers. As the record in this proceeding again demonstrates, NYT has an enormous incentive to apply only the metric that it can satisfy, not the metric that satisfies the buyer. NYT's claim that both it and its competitors were getting "comparable" provisioning because NYT also had a manual provisioning process -- its end user customers could not directly

input orders into the NYT systems (NYT Response to Staff-NYT-1.6; Tr 499-500 (Butler)) -- shows how strong the temptation is to tailor standards and metrics to what NYT can do, rather than to what customers need and are entitled to expect. A process for establishing agreed-to metrics is, therefore, critical.

Finally on this topic, the record demonstrates why, once metrics are developed, NYT must show, over a reasonable period of time, that it can meet those metrics. The PRP experience with end user metrics, NYT's prolonged record of poor provisioning of T1.5 services (and its adaptation of the metrics from what its customer wanted to what its deteriorating organization could deliver), and the experience of ACC, AT&T, TCG, MCI, and others with NYT collocated cages demonstrate that the fact that NYT has agreed to a standard of performance is no guarantee that NYT will or even can meet that standard. NYT is, as a matter of law, required to show that it can deliver on its checklist obligations, and it can make that showing only on the basis of some reasonable evidence that it has consistently done so over some period of time.

A third theme that resonates through the record is the difference in what NYT and its customers see as commercially reasonable provisioning. In general, NYT's approach to new issues or to matters that require a new application is a cottage

⁵AT&T will add to the mood, under separate case, until

industry approach. For each relevant item, NYT proposes to fashion a customized offering virtually from scratch. The number of places where NYT proposes to "offer" a checklist item by some variation on a bona fide request process is disturbingly large. A classic example is NYT's response to the hardly-unexpected request for two-way trunking. NYT's idea of commercially reasonable provisioning is as follows:

"[A]s far as the two-way trunks we've had some discussions most recently about doing some studies and then going into two-way trunks, so when we say that we are evolving, and I think we just had a recent meeting we're going to do some comparative traffic studies to do two-way trunks." Tr. 215-216 (Garzillo).

Commercial provisioning in telecommunications cannot be done on a "build it from scratch" basis. To the greatest extent possible, all of the elements and interconnection arrangements must be available very quickly, in mass market quantities, and pursuant to terms and conditions that are precise and precisely known in advance. As we will show below, NYT has demonstrated a near-total absence of established methods and procedures for obtaining almost anything, and the lack of established and reasonable methods and procedures is a severe barrier to competitive activity by CLECs. Hou, pp. 46-47.

A final theme worth noting is the critical importance of obtaining NYT's compliance with its checklist obligations. We would anticipate NYT arguing that the concerns expressed herein and in the submissions of other interested parties are simply bad faith attempts to prevent NYT from offering long-distance

service. One of the most impressive aspects of this record, however, is how many carriers have already sought to obtain checklist items from NYT for immediate commercial use as competitors in New York. Loops, switching, both physical and virtual collocation, tandem switching, direct and tandem trunking, customized routing to operator platforms, number portability, reasonable access to white pages listings and databases -- the record shows that one or more parties has sought, and been unable to obtain on a reasonable basis, each of these, for immediate, commercial use. In many cases, the requests for reasonable provisioning go back several years.

In summary, the record, discussed more fully below, clearly shows that NYT is <u>not</u> providing (or making "generally available") access, interconnection, and unbundled elements as required by the Act. NYT is not currently furnishing to CLECs any of the following unbundled elements: local switching; interoffice transmission facilities; AIN features; OSS functions; or unbundled OS/DA that permits customized routing to CLEC or third party OS/DA platform. Other network elements (<u>e.g.</u>, the loop, the NID) either are not available on a timely basis at commercially significant volumes, or are not provided on a parity basis with NYT's provisioning of such items for itself. The record shows that the major deficiencies in NYT's Section 271 application are:

Interconnection--NYT maintains discriminatory and unreasonable provisioning intervals for interconnection, and it is currently unable to provide virtual collocation. NYT also does not furnish CLECs with physical collocation on commercially reasonable or nondiscriminatory terms.

Nondiscriminatory Access to Unbundled Network Elements—NYT is not providing commercially reasonable and nondiscriminatory access to any unbundled network element because its OSS systems for unbundled network elements are not fully functional and because it has not yet developed commercially reasonable methods and procedures. Moreover, NYT has not shown that it is providing nondiscriminatory access to UNEs, because it has not developed or provided information on the intervals at which it provisions unbundled network elements (or equivalent capabilities) to itself and its retail customers.

Poles. Ducts. Conduits. Rights-of-Way. and other Pathways-NYT does not provide access to poles, ducts, conduits,
rights-of-way, and other pathways on a nondiscriminatory
basis. Instead, NYT restricts access to pathways on
commercially unreasonable grounds, does not provide access
on a parity basis, imposes discriminatory conditions for
access, and has not demonstrated that its rates for such
pathways are just and reasonable.

<u>Unbundled Loops</u>--NYT cannot provision the volumes of unbundled loops that will be required for mass-market CLECs, which will frustrate the development of effective competition. In addition, NYT does not satisfy the loop provisioning intervals that it has established.

<u>Unbundled Local Transport</u>--NYT is not currently furnishing unbundled transport to any CLEC, and its documented poor record in providing transport facilities and services undercuts any claim that NYT's interoffice transmission facilities will be available on a commercially reasonable and nondiscriminatory basis.

Unbundled Local Switching--NYT is not furnishing unbundled local switching to any CLEC and has only recently begun discussions with one CLEC regarding this element. Moreover, NYT's network design request ("NDR") process is a commercially unreasonable delivery process for so basic an activity as switch provisioning. The NDR process gives NYT the opportunity to impose unreasonable delay and costs, and to discriminate against CLECs seeking to provide unbundled switching. In addition, NYT's offering violates the FCC's requirements because it fails to provide CLECs purchasing the unbundled local switch element with all the features and functions of the switch.

Interim Number Portability--NYT has failed to provide interim number portability to AT&T on commercially reasonable terms and conditions and has created artificial constraints that prevent AT&T from implementing interim number portability for its customers.

Access to Signaling & Databases--NYT has acted in a discriminatory and commercially unreasonable manner in failing to make transactions capabilities application part messages ("TCAP messages") available to AT&T for many months. AT&T's experience shows that it is doubtful that NYT's network will be programmed to exchange TCAP messages with CLECs in a timely manner. In addition, NYT has failed to provide written procedures that would permit a CLEC to order or obtain the AIN services that the FCC and this Commission have ordered to be made available.

Operator Services and Directory Assistance ("OS/DA") -- NYT has not complied with the Commission's order to unbundle OS/DA by March 1, 1997, which is necessary to allow customized routing to CLEC or third-party OS/DA platforms by purchasers of the unbundled local switching element. For resale customers, routing of calls to CLEC or third-party OS/DA platforms will not be available until June 1, and NYT is proposing discriminatory terms and conditions that would delay the availability of customized routing to third-party

OS/DA platforms beyond the June 1, 1997 deadline. In addition, NYT has just advised AT&T that NYT will not provide its stand-alone OS/DA platform and offer unbranding and rebranding to customers that also buy NYT's unbundled switching element. It will, however, provide unbranded and rebranded services to customers that provide their own switching. This is patently discriminatory.

Resale -- NYT has failed to comply with the FCC's requirement to provide resellers with nondiscriminatory and parity access to its OSSs. NYT's OSS offering to resellers is marked by discriminatory response times, discriminatory imposition of manual intervention for CLEC orders, and uncertain reliability. NYT also has not proposed acceptable performance metrics to measure parity access to its OSSs. None of the OSS interfaces currently operates in a commercially reasonable manner -- the Web/GUI and EIF are inadequate, and the EDI is still under development. NYT has also failed to show that its OSS interfaces have sufficient capacity to handle large volumes of CLEC service requests. NYT's processes for handling resale orders are commercially unreasonable and discriminatory, because they do not allow CLECs to place "Migration As Specified" orders or to make changes to service orders until the order has been processed by NYT's order processing system.

NYT's application also relies upon a number of significant legal errors in interpreting Section 271's requirements. First, NYT cannot rely on Track B and the SGAT as a basis for seeking in-region interLATA relief. Several carriers have requested and negotiated interconnection agreements with NYT. As a result, the Act requires NYT to seek in-region interLATA relief solely pursuant to the provisions of Track A of Section 271. Track B is a narrow exception designed by Congress to deal with the unlikely event that interexchange carriers and others would refuse to enter into interconnection arrangements with ILECs to avoid competition in the interexchange market. That unlikely eventuality never came to pass in New York. NYT has executed a number of interconnection agreements and is in the process of finalizing interconnection agreements with AT&T, MCI, and others. In light of the executed and anticipated interconnection agreements, Track B is not available to NYT.

A second legal error in NYT's application is its attempt to "mix-and-match" portions of its executed interconnection agreements and portions of its SGAT to satisfy the provisions of Section 271. The statutory language is clear, however, that Track A and Track B are separate and distinct standards for obtaining in-region interLATA relief. Thus, an RBOC cannot use provisions from both interconnection agreements that are relevant to the Track A standards and the SGAT that is relevant only for the Track B standards to meet the Section 271 requirements.

NYT has also failed to provide evidence demonstrating that it has satisfied the other requirements of Section 271.

Critically, NYT has not identified any "unaffiliated competing provider" of services to "residential and business subscribers" over predominantly its own facilities. NYT makes the bald assertion that such competition exists, but fails to provide evidence of it. Certain CLECs have entered the market, but the number of customers that they serve is minuscule -- covering less than 0.5% of NYT's access lines -- and these CLECs cannot possibly discipline NYT's market power. Accordingly, these CLECs cannot be regarded as "competing" providers at this time.

Moreover, there is no evidence that any of these carriers presently serves both residential and business customers using predominantly its own facilities as required by Section 271(c) (1) (A).

The remainder of this brief is organized in accordance with the April 8, 1997 Procedural Ruling. The body of the brief begins with a discussion of the evidence regarding each checklist item including whether the item is commercially available and, if so, if it is available on terms and conditions that are just, reasonable, and nondiscriminatory. To avoid repetition, unbundled network elements that are also separately included on the competitive checklist are discussed as checklist items. Following the discussion of the competitive checklist, the brief

addresses the legal issues identified in the Procedural Ruling.6

Finally, AT&T commends the Administrative Law Judges and the Commission Staff for developing an extensive factual record in this case during the three days of the technical conference. Each item of the competitive checklist was reviewed, and all parties were afforded ample opportunity to present evidence on each of these issues. Even though NYT's application was deficient on its face, the hearing process and the resulting factual record have increased the Commission's and the parties' knowledge regarding the status of NYT's efforts to open its network to competition.

One valuable lesson to be learned from this proceeding is that the Commission should use the learnings gleaned here to establish specific criteria -- including performance metrics -- that NYT must satisfy in any future application. The development of such criteria will not only discourage NYT from filing another premature application, but will also ensure that NYT will

^{*}AT&T's brief does not address public interest issues, because no mention was made of these issues in the April 8 Procedural Ruling. These issues have been addressed in other proceedings, and in light of the tight time schedule, the large factual record showing NYT has not complied with the competitive checklist, and the fact that such issues are not part of the consultative process between this Commission and the FCC, AT&T agrees that public interest issues do not need to be considered, or even briefed, at this time.

⁷In the absence of such criteria, it is clearly possible that NYT may file another deficient application, and perhaps another and then complain that it is being forced to satisfy (continued...)

provide the Commission and the parties with critical information necessary to determine whether NYT has satisfied the statutory requirements. These criteria should include both performance metrics to determine if NYT is providing access, interconnection, and unbundled elements on a commercially reasonable and nondiscriminatory basis, and guidelines on the types of evidence that NYT must submit to demonstrate compliance with the competitive checklist. These criteria and performance metrics should be developed collaboratively. Accordingly, AT&T recommends that a technical conference be quickly convened with NYT and interested parties to determine what criteria and performance metrics should be developed and included in any future Section 271 application.

ordess technical requirements as part of the application process. Of course, the answer to such a complaint is clear -- NYT needs to make only one application, if it is done correctly the first time.

^{*}As an example, the performance metrics would establish whether, for example, NYT was providing transport facilities for CLECs within the same time frame that it provides such facilities to itself, and the guidelines might include, for example, a standard for response times to a CLEC's request for customer service records as part of the OSS pre-ordering process.